

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRET THOMAS COLE,

Defendant-Appellant.

UNPUBLISHED

July 1, 2014

No. 312155

Oakland Circuit Court

LC No. 2012-239799-FC

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a term of 42 months to 10 years in prison for the assault conviction, and a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's conviction arises from the July 1, 2011, shooting of Michael Anton, who was shot in the face after answering a knock at the front door of his house. Anton did not see who shot him. Defendant became a suspect after he attempted to negotiate two forged checks from the victim's bank account on August 23, 2011. Defendant thereafter gave a series of statements to the police admitting his involvement in the offense. Defendant initially stated that he and a friend went to Anton's home intending to steal from Anton's garage. They knocked on Anton's door to make sure he was not at home and did not initially receive an answer. Defendant claimed that after returning to his truck, his friend grabbed a rifle from the truck, Anton answered the door, and defendant's friend fired the rifle toward the front door. Defendant later gave another statement in which he admitted that he was the shooter, but denied intending to shoot Anton.

Defendant challenges the trial court's denial of his motion to suppress his pretrial statements to the police. Defendant argues that the statements were not voluntarily made because he had no prior convictions, was experiencing Soboxin withdrawal during his interrogation, and the police interviewed him more than once, subjected him to multiple polygraph examinations and then manipulated his father into communicating with defendant for them and procuring his inculpatory statements.

When reviewing a trial court's ruling on a motion to suppress evidence, we consider de novo the legal question of ultimate admissibility concerning the knowing, intelligent, and voluntary nature of a statement. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000); *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). When considering "a trial court's determination of voluntariness, we examine the entire record and make an independent determination." *Id.* at 264. We review for clear error the findings of fact that the trial court makes in support of its ruling. *Daoud*, 462 Mich at 629; *Gipson*, 287 Mich App at 264. We must affirm the factual findings unless our review of the record leaves us "with a definite and firm conviction that" the trial court made a mistake. *Id.* We defer "to a trial court's assessment of the weight of the evidence and the credibility of the witnesses." *Id.*

A statement that an accused made during a custodial interrogation qualifies as inadmissible unless the prosecution establishes by a preponderance of the evidence that the accused voluntarily, knowingly, and intelligently waived his *Miranda*¹ rights. *Daoud*, 462 Mich at 633-634. Police influence that induces a defendant to offer a statement may take the form of mental coercion, as well as physical. *People v Manning*, 243 Mich App 615, 625; 624 NW2d 746 (2000). To determine whether a suspect has volunteered a legally admissible statement, a court must review the totality of the surrounding circumstances to ascertain if the statement constitutes "the product of an essentially free and unconstrained choice by its maker." *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (internal quotation and citation omitted). An inquiry regarding voluntariness should take into account "the conduct of the police," with consideration given to whether the police made promises of leniency to induce the statement, *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003), as well as the following relevant factors:

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. . . . [*Cipriano*, 431 Mich at 334.]

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

After reviewing the record at the *Walker*² hearing, we cannot conclude that the trial court clearly erred in its factual findings that defendant established almost no indicia of involuntariness. *Daoud*, 462 Mich at 629. Defendant agreed that he had an education and had read and understood the documents outlining his *Miranda* rights, and officers testified and produced documentation that they had informed him of his rights at the outset of discussions on August 25, 2011, September 28, 2011, and October 19, 2011. Defendant had some experience with the police at the time of the interviews in this case, the first of which occurred two days after police officers arrested him and interviewed him regarding checks he allegedly stole from the victim. The record does not establish that the officers subjected defendant to prolonged questioning or delayed in charging him before he gave his statements. Although defendant testified at the hearing that he was under the influence of prescription medications at the time of his initial interview in August 2011, several officers testified that defendant repeatedly told them that he felt fine and denied using drugs, and all of the interviewing officers testified that he appeared coherent and in good health. The record contains no suggestion that defendant needed food, medical attention or rest, or that the police abused defendant or threatened him with abuse. We conclude that a preponderance of the evidence establishes that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights, and the trial court correctly concluded that defendant offered his statements knowingly and voluntarily. *Daoud*, 462 Mich at 629, 633-634.

Defendant additionally avers that the jury's verdict is against the great weight of the evidence. According to defendant, the evidence agreed that he only intended to scare the victim with a small, .22-caliber rifle, and the evidence showed that the bullet likely ricocheted before hitting the victim. We review for an abuse of discretion the trial court's ruling on a defendant's motion for a new trial challenging the verdict as against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

"Under statute [MCL 770.1], as well as the court rule [MCR 6.431(B)]," a trial court may grant a defendant a new trial "in the interest of justice or to prevent a miscarriage of justice." *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998) (internal quotation and citation omitted). To ascertain whether a verdict contravenes "the great weight of the evidence, or has worked an injustice," a reviewing court "necessarily reviews the whole body of proofs." *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), rev'd in part on other grounds in *Lemmon*, 456 Mich at 627. A trial court may grant a new trial based on a challenge to "the weight of the evidence . . . only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *Lemmon*, 456 Mich at 642 (internal quotation and citation omitted). "[A]bsent exceptional circumstances, issues of witness credibility . . . [belong to] the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination thereof." *Id.* (internal quotation and citation omitted). "[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646 (internal quotation and citation omitted).

The crime of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), requires the prosecutor to prove that the defendant committed "(1) an assault, i.e., an attempt or offer with force and violence to do corporal hurt to another coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996) (internal quotation and citation omitted), amended 453 Mich 1204 (1996). The intent to inflict great bodily harm means "an intent to do serious injury of an aggravated nature." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotation and citation omitted). A jury can reasonably infer a defendant's intent to cause great bodily harm from other facts in evidence, including evidence of the defendant's actions, and because of the difficulty inherent in proving an actor's state of mind, only minimal circumstantial evidence need exist. *Id.*; *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). A jury may infer a defendant's intent to inflict great bodily harm from his conduct, the means employed to commit the assault, and the manner of the assault. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982).

Defendant asserts that he only intended to scare the victim with a small, .22-caliber rifle, which people generally use to hunt squirrels and other small animals. Hazel Park Police Detective John Colley, the officer in charge of the investigation, testified about the inculpatory statement that defendant gave on October 19, 2011, which included the following relevant details: (1) sometime late on June 30, 2011, or early on July 1, 2011, defendant suggested to a friend going to the victim's house "to break into his garage"; (2) defendant drove to the victim's house; (3) defendant "had put [his] .22 rifle on the front seat with the case unzipped"; (4) after defendant did not receive an answer when knocking on the victim's door and returned to his pickup, he "saw the porch light come on and [the victim] open the door"; (5) defendant felt "really scared that [the victim] would recognize [his] truck," and decided to shoot toward "a big opening in the glass door . . . [to] just scare him"; (6) defendant denied intending to hit or hurt the victim.

Defendant's admission that he fired a rifle at the victim's front door where he saw the victim standing, together with the evidence that the victim suffered a serious gunshot wound to his jaw that necessitated a week-long hospitalization, constitute ample proof giving rise to a reasonable inference that defendant intended to seriously harm the victim. Although Hazel Park Police Detective Michael Grigsby characterized the ammunition for a .22-caliber rifle as very small and believed that many people used a .22-caliber rifle "to kill rodents . . . or squirrels," he confirmed that a shot from a .22-caliber rifle definitely could injure a human being. Grigsby elaborated that a .22-caliber rifle ejects its ammunition at between 1,100 and 1,500 feet a second, and opined that a moderate marksman parked in front of the victim's house could have hit the victim by simply aiming the rifle directly at him. Defendant in fact seriously injured the victim with the shot from the .22-caliber rifle.

We conclude that the evidence did not heavily preponderate against the jury's finding that defendant intended to inflict "serious injury of an aggravated nature," *Brown*, 267 Mich App 147, by aiming and firing the high-speed rifle at the victim from a relatively short distance for rifle purposes. *Id.* at 151-152 (explaining that "a rational view of the evidence in this case

supports the charge of assault with intent to do great bodily harm less than murder,” where the defendant admittedly fired a gun, the victims were shot at close range, and they suffered serious injuries); see also *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (finding intent to commit great bodily harm on the basis of the defendant’s assault with a pistol).

With respect to defendant’s contention that a bullet likely ricocheted before hitting the victim, defense counsel submitted a theory that the victim had suffered a gunshot wound when a bullet ricocheted from another hard surface through the victim’s storm door and into his face, which arguably signified that no one had fired a shot directly toward the victim. However, the evidence technician who collected evidence on the day of the shooting could not say whether the bullet might have ricocheted before striking the victim’s door. Colley testified that he was familiar with evidence left behind by ricocheting bullets, that he had gone to the victim’s house approximately five times, and that on each occasion he looked for evidence of ricochets or other holes near the house, but never observed “any evidence of ricochet.” Colley acknowledged on cross-examination that anything, including a ricochet, was possible. Grigsby similarly testified that he had visited the victim’s house four or five times, specifically had looked for evidence like areas of ricochet, but never observed any evidence of a bullet ricochet. Our review of the record reveals no direct evidence that a bullet ricochet existed in this case, and the evidence thus did not preponderate heavily against the jury’s finding that defendant intended to injure the victim.

We conclude that the trial court acted within its discretion in denying defendant’s motion for a new trial.

Defendant lastly suggests that the trial court violated his due process rights when it improperly allowed amendment of the information to include an aiding and abetting theory of guilt. The trial court in fact acquiesced in the prosecutor’s request to instruct the jury regarding the requirements for finding defendant guilty as an aider and abettor of the shooting. We review de novo issues of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). “A criminal defendant has the right to have a properly instructed jury consider the evidence against him.” *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). The jury instructions must include all elements of the charged offenses, and must not omit material issues, defenses and theories that the evidence supports. *Bartlett*, 231 Mich App at 143.

MCL 767.39 provides that “[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.” Consistent with this statute, the trial court instructed the jury that it could convict defendant as an aider and abettor of the assault of the victim. To support a conviction pursuant to an aiding and abetting theory of guilt, the prosecutor was required to show that (1) defendant or some other person committed the crime charged, (2) defendant performed acts or offered encouragement that assisted the crime’s commission, and (3) either (a) at the time that defendant gave aid and encouragement, he possessed (i) the requisite intent necessary to support his conviction of the charged crime as a principal, or (ii) knowledge that the principal intended the commission of the charged crime, or (b) “the criminal act committed by the principal is an incidental consequence which might reasonably be expected to result from the intended wrong.” *People v Robinson*, 475 Mich 1, 6, 9; 715 NW2d 44 (2006) (internal quotations and citation omitted); see also *People v Mass*, 464

Mich 615, 628; 628 NW2d 540 (2001). “An aider and abettor’s state of mind may be inferred from all the facts and circumstances.” *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

“To place the issue of aiding and abetting before a trier of fact, the evidence need only tend to establish that more than one person committed the crime, and that the role of a defendant charged as an aider and abettor amounts to something less than the direct commission of the offense.” *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1990). “The phrase ‘aids or abets’” encompasses “any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.” *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). “In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime.” *Moore*, 470 Mich at 71. “[W]hether the defendant performed acts or gave encouragement that assisted” “must be determined on a case-by-case basis.” *Id.* (internal quotation and citations omitted).

We conclude that the trial court properly decided to instruct defendant’s jury concerning the requisites for finding guilt pursuant to an aiding and abetting theory because the record supported the instructions. Two of defendant’s own statements that the prosecutor introduced supported his initial theory that a friend of his had jointly participated in the assault of the victim. Defendant’s early statements to the police reported that he went to the victim’s house with his friend, that he brought his rifle along but did not intend to discharge it, and that his friend fired a gunshot toward the victim’s house. Defendant’s father testified regarding his belief that defendant’s friend shot the victim. The evidence thus reasonably tended to prove that (1) defendant or his friend shot the victim, (2) defendant performed acts or offered encouragement that assisted the crime’s commission [in one version of events, defendant brought the rifle that his friend had used to shoot the victim], and (3) either (a) at the time that defendant gave aid and encouragement, he possessed (i) the requisite intent necessary to support his conviction of the charged crime as a principal, or (ii) knowledge that the principal intended the commission of the charged crime [established by defendant’s reports that he had driven his friend to the victim’s house, brought his rifle, and either shot toward the victim or watched as his friend shot at the victim].

Because the record supported the aiding and abetting instructions, we reject as without merit defendant’s contention that the prosecutor’s failure to charge aiding and abetting in the information precluded the aiding and abetting jury instructions. This Court has consistently rejected claims that because “the information filed by the prosecutor never included a charge of aiding and abetting, the charge . . . resulted in a denial of due process.” *People v Clark*, 57 Mich App 339, 343; 225 NW2d 758 (1975).

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood